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Case - Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 700

BORG-WARNER CORPORATION and
DAVID E. GAMBLE,
Petitioners,

vs.

GEORGE I. GOODWIN and JOHN F. DAUKUS,
Respondents.

**MOTION FOR LEAVE TO FILE PETITION FOR
REHEARING AND PETITION FOR REHEARING.**

MAX W. ZABEL,
EDWARD C. GRITZBAUGH,
BENTON BAKER,
Counsel for Petitioners.

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OPINION OF THE COURT BELOW.

The Court of Appeals entered its order of April 9, 1947, denying petitioners' motions without opinion.

The previously rendered opinion of the Court of Appeals entered with its decree of July 1, 1946, is officially reported in *Goodwin v. Borg-Warner Corp.*, 157 F (2d) 267.

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Respondents.

**MOTION FOR LEAVE TO FILE PETITION FOR
REHEARING.**

*To the Honorable Frederick M. Vinson, Chief Justice of
the United States, and the Associate Justices of the
Supreme Court of the United States:*

Your Petitioners respectfully request leave to file the accompanying (second) petition for rehearing of the petition for writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit in the above entitled case, denied by this Court January 6, 1947; petition for rehearing denied February 3, 1947.

Reasons for Asking Leave.

I. Since the order denying the petition for writ of certiorari and prior to the issuance of mandate from the Circuit Court of Appeals for the Sixth Circuit, further

proceedings in this cause were had in that Court, as follows:

On February 6, 1947, petitioners (appellees below) filed in that Court two motions (1) to reform the decree of that Court entered July 1, 1946, "by deleting therefrom the words 'the decree of the said District Court' and inserting in lieu thereof the words 'that part of the decree of the said District Court which dismisses defendant's counterclaim' " so as to conform the decree to the amended notice of appeal, and (2) "that the decree heretofore and on the first day of July, 1946, filed and entered in the above entitled cause be vacated and the appeal dismissed" as the controversy had become moot, and "alternatively, and additionally, that the cause be remanded to the District Court of the United States for the Eastern District of Michigan for the purpose only of permitting and enabling the said plaintiffs to file in that Court an amended and supplemental answer to defendants' counterclaim setting forth as a defense the matters hereinafter stated, and a responsive pleading, if desired, by defendants, appellants, and a trial of the issue presented thereby and an adjudication thereof by the said District Court, and further proceedings according to law, to the end that this Court may be better advised in its determination of the matters presented herein."

Following a hearing on those two motions (pursuant to an order of court and at respondents' request) before the court in chambers, held April 8, 1947, the said Circuit Court of Appeals by an order dated April 9, 1947, denied the motions without opinion.

II. A petition for writ of certiorari to review the proceedings on those motions is being filed in this Court contemporaneously with this petition. Those proceedings are set forth in a transcript of record filed with that petition, and the Court is requested to take judicial notice of that petition and the brief and transcript accompanying it

in considering this petition and for the purposes of this petition to treat the said petition, brief and transcript of record as if incorporated in this petition.

III.. It is believed that the jurisdictional and other questions presented by the motions which have been mentioned and which are the subject of the companion petition for writ of certiorari, though not previously raised, affect the judgment of which review was sought in this case and that a well recognized ground for the exercise of jurisdiction by this Court exists as set forth in the said companion petition and the proposed petition for rehearing.

Cases in which this Court has granted leave to file a petition for rehearing of an order denying a petition for writ of certiorari after the expiration of the period allowed by Rule 33 in similar circumstances include:

Kellogg Company v. National Biscuit Company,
304 U. S. 586; s. c. 302 U. S. 777, 733.

Scriber-Schroth Co. v. Cleveland Trust Co., 304
U. S. 587; s. c. 303 U. S. 667, 639.

Paramount Public Corp. v. American Tri-Ergon Corp., 293 U. S. 528, 55 S. Ct. 139, 79 L. Ed. 638.

Altoona Public Theatres, Inc. v. American Tri-Ergon Corp., 293 U. S. 528, 55 S. Ct. 139, 79 L. Ed. 638.

We respectfully submit that this Court should grant petitioners leave to file the accompanying petition for rehearing of the petition for writ of certiorari to the Court of Appeals for the Sixth Circuit in the instant case, denied by this Court January 6, 1947, and that the accompanying petition for rehearing should be granted.

MAX W. ZABEL,

EDWARD C. GRITZBAUGH,

BENTON BAKER,

Counsel for Petitioners.

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Supreme Court of the United States

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No. 700

BORG-WARNER CORPORATION and
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Petitioners,

VS.

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Respondents.

PETITION FOR REHEARING.

*To the Honorable Frederick M. Vinson, Chief Justice of
the United States, and the Associate Justices of the
Supreme Court of the United States:*

Your petitioners respectfully request that the Court reconsider its action of January 6, 1947, denying petitioners' petition for writ of certiorari filed in the above entitled case November 18, 1946; that the order then entered in the case be revoked or vacated; and that a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit be granted according to the prayer of said petition.

The reason for this petition is that during the present term of this Court and since February 3, 1947, when

this Court denied petitioner's first petition for rehearing of their said petition for writ of certiorari in this cause, further proceedings have been had in the Circuit Court of Appeals for the Sixth Circuit, as follows:

On February 6, 1947, petitioners (appellees below) filed in that Court two motions:

(1) to reform the decree of that Court entered July 1, 1946, "by deleting therefrom the words 'the decree of the said District Court' and inserting in lieu thereof the words 'that part of the decree of the said District Court which dismisses defendant's counterclaim'" so as to conform the decree to the amended notice of appeal, and

(2) "that the decree heretofore and on the first day of July, 1946, filed and entered in the above entitled cause be vacated and the appeal dismissed" as the controversy had become moot,

and "alternatively, and additionally that the cause be remanded to the District Court of the United States for the Eastern District of Michigan for the purpose only of permitting and enabling the said plaintiffs to file in that Court an amended and supplemental answer to defendants' counterclaim setting forth as a defense the matters hereinafter stated, and a responsive pleading, if desired, by defendants, appellants, and a trial of the issue presented thereby and an adjudication thereof by the said District Court, and further proceedings according to law, to the end that this Court may be better advised in its determination of the matters presented herein."

Those motions were filed in the Court of Appeals promptly following the denial of the petition for rehearing by this Court and prior to the issuance of mandate from the Court of Appeals. Following a hearing on those two motions (pursuant to an order of Court and at respondents' request) before the Court in chambers, held April 8, 1947, the said Circuit Court of Appeals by an

order dated April 9, 1947, denied the motions without opinion.

A petition for writ of certiorari to review the proceedings on those motions is being filed in this Court contemporaneously with this petition. Those proceedings are set forth in a transcript of record filed with that petition, and the Court is requested to take judicial notice of that petition and the brief and transcript of record accompanying it in considering this petition and, for the purposes of this petition, to treat the said petition, brief and transcript of record as if incorporated in this petition.

It is believed that the jurisdictional and other questions presented by those motions, for the reasons stated in the companion petition for writ of certiorari and the brief in support thereof, warrant reconsideration by this Court of petitioner's previously filed petition for writ of certiorari and the granting of the writ to the end that the decree of the Sixth Circuit Court of Appeals entered July 1, 1946, be reviewed and appropriate directions be given to that court in the interest of the expeditious administration of justice.

The attention of the Court is called particularly to the fact that, in addition to departing from applicable decisions of this Court in refusing to reform its decree to conform to the amended notice of appeal and to vacate its decree and dismiss the appeal for failure of jurisdiction due to invalidity of the patent under the disclaimer statutes, the Sixth Circuit Court of Appeals in pronouncing "the patent" valid and reversing the judgment of the District Court generally will surely confound the District Court. This is so because the decree of the Court of Appeals imposes on the District Court the impossible duty of reconciling with the decree of the Court of Appeals the unappealed part of its own judgment adjudging all claims of the patent in suit invalid. Obviously, the decision of the

Court of Appeals pronouncing "the patent" valid and adjudging valid and infringed the nine specified claims upon which respondents relied for infringement is incompatible with the unappealed part of the District Court's judgment adjudging all claims of the patent invalid, especially in view of the disclaimer statutes. The impropriety of placing the District Court in the predicament of having to reconcile the two irreconcilable judgments seems manifest. The observations of this Court in *Hormel v. Helvering*, 312 U. S. 552, 557 quoted in the brief in support of the companion petition for writ of certiorari appear to be quite in point.

Cases in which this Court has granted a petition for rehearing and revoked or vacated an order denying a petition for certiorari and granted such writ in similar circumstances include:

Kellogg Company v. National Biscuit Company,
304 U. S. 586, s. c. 302 U. S. 777, 733.

Schriber-Schroth Co. v. Cleveland Trust Co., 304
U. S. 587; s. c. 303 U. S. 667, 639.

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MAX W. ZABEL,
EDWARD C. GRITZBAUGH,
BENTON BAKER,

Counsel for Petitioners.

I, Benton Baker, counsel for the above named petitioner do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

BENTON BAKER.